TEOH HOE CHYE

v.

PUBLIC PROSECUTOR & ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
GEORGE SEAH SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 4 & NO. 5 OF 1986]
15 SEPTEMBER 1986

CRIMINAL LAW AND PROCEDURE: *Appeal against conviction and death sentence under s. 39B(2) of the Dangerous Drugs Act 1952 - Whether break in chain of evidence is fatal to prosecution case.*

This was an appeal by the 1st and 2nd appellants against the whole of the decision of the learned Judge of the High Court at Penang where both were convicted and sentenced to death under s. 39B(2) of the Dangerous Drugs Act 1952.

The appellants were arrested for trafficking in drugs in a hotel. From the hotel, both the appellants were taken to the arresting officer's office at about 5.20 p.m. The arresting officer, superintendent of customs Low Tak Fun (Supt. Low), then handed the drugs which were in 10 packages wrapped in brown paper in a brown bag to superintendent of customs Lum Weng Foo (Supt. Lum). At about 7.20 p.m. the same day, Supt. Low arrived with a chemist to carry out initial test of the drugs. No evidence was led as to what exactly happened to the exhibits between the time of handing over by Supt. Low to Supt. Lum and the subsequent examination by the chemist.

The following main grounds were raised in the appeal:

(a) that the learned Judge had erred in law in not concluding that the non-calling of the investigating officer, Supt. Lum, was fatal to the prosecution case;

(b) that the learned Judge had erred in not concluding that there was a break in the chain of evidence relating to the exhibits; and

(c) whether the failure to call a particular witness gave rise to a serious gap in the prosecution case.

Held:

[1] In so far as the trial Court is concerned, its duty is essentially to decide whether on the evidence before it, the prosecution has proved its case. Whether a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case, there was such a failure.

[2] The failure to call Supt. Lum as a witness had caused a serious break in the chain of evidence relating to the identity of the exhibits.

[3] It is a question of proof whether in fact the exhibits produced were the exhibits that were seized.

[Appeal allowed and conviction set aside. Both appellants acquitted and discharged.]

Cases referred to:
Abdullah Zawawi v. PP [1985] CLJ (Rep) 19
See Ah Ping v. PP [1980] 1 MLJ 75
Sia Soon Suan v. PP [1966] 1 MLJ 116

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)

For the appellant Teoh - R. Rajasingam; M/s Rajasingam & Co.
For the appellant Yeap - K. Kumaraendran (V. Sithambaran with him); M/s. Kumar & Co.
For the public prosecutor - Encik Mohtar Abdullah, DPP

JUDGMENT

Abdul Hamid Omar CJ (Malaya):

In both the appeals, Teoh Hoe Chye (first appellant) and Yeap Teong Tean (second appellant) are appealing against the whole of the decision of the learned Judge of the High Court at Penang (Criminal Trial No. 6/81) where both were convicted and sentenced to death on a charge which reads as follows:

> That you jointly on 10 March 1981 at about 4.30 p.m., in the lobby of Rasa Sayang Hotel, Batu Ferringhi, in the District of Georgetown, in the State of Penang, in furtherance of the common intention of you both, did on your own behalf traffic in dangerous drugs, to wit, 1608.7 grammes of heroin and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act, 1952 and punishable under s. 39B(2) of the same Act read with s. 34 of the Penal Code.

The case for the prosecution revealed that as a result of information received, a U.S. Drug enforcement administration agent (the agent) was introduced to the second appellant sometime in December 1980. A few meetings took place subsequently. The purchase of the heroin was discussed among the agent, the second appellant and the informant. Sometime in March, 1981, the purchase price was agreed and the second appellant was to arrange for the supplier to deliver the drugs to a hotel room. A plan was conceived. As part of the plan the informant was to fetch the second appellant and the supplier from some place and take them to a room at Rasa Sayang hotel to meet the agent. The informant would then accompany the supplier (identified by the agent as the first appellant) to collect the heroin while the agent was to wait in the room. It was also part of the plan that the informant would give a signal after the first appellant had collected the drugs.

On 10 March 1981, at about 2.55 p.m., a party of eight customs officers took up position at Rasa Sayang Hotel. At 3.50 p.m. the second appellant arrived at Room 303, Rasa Sayang Hotel, with the informant and the first appellant. After the bag containing the money was inspected by the first appellant, the informant accompanied him to a car parked at the hotel car park.

At about 4.20 p.m. Encik Low Tak Fun, superintendent of customs (Supt. Low), a member of the customs ambush party, saw the first appellant walking to the lobby carrying a brown bag and proceeding towards a poster board. The first appellant placed the bag on the floor and waited there. Supt. Low then saw the informant who was near the in-house telephone booth giving the prearranged signal to effect arrest by lifting up the phone. Supt. Low signalled his officers to effect the arrest. Upon arrest Supt. Low took possession of the brown bag. From there he took the first appellant to the car parked under the porch in front of the hotel lobby. Inside the car Supt. Low examined the bag and found 10 packages wrapped in

brown paper. Meanwhile the informant phoned the agent to tell him and the second appellant that the first appellant had been arrested. Both the agent and the second appellant came down to the lobby. The second appellant was then arrested.

From the hotel both the first and second appellants were taken to Supt. Low's office at Weld quay, reaching there at about 5.20 p.m. While they were there, Supt. Low handed the bag which was believed to contain the drugs to the superintended of customs, Lum Weng Foo (Supt. Lum). No evidence was led as to what Supt. Lum did with the exhibits. The evidence however disclosed that at approximately 7.40 p.m. on that evening Supt. Low arrived at the customs office accompanied by Mr. Law Yong Tong, the chemist, who conducted an initial test of the drugs. After the test, Supt. Low said that he weighed the 10 packages and kept the exhibits in his office under lock and key.

A number of grounds were raised in this appeal, the principal argument was that the learned trial Judge had erred in law in not concluding that the non-calling of Supt. Lum, the investigating officer, was fatal to the prosecution case. Further, that the learned Judge had erred in not concluding that there was a break in the chain of evidence relating to the exhibits.

Fundamentally, the matter in issue is not whether there was a failure to call or not to call the investigating officer but whether the failure to call a particular witness gave raise to a serious gap in the prosecution case.

In the instant case, Supt. Low testified to the effect that he handed over the exhibits at his office to Supt. Lum, the investigating officer, at about 5.20 p.m. He apparently left the office to return only at about 7.40 p.m, some 2 hours 20 minutes later, with the chemist who carried out an initial test to determine whether the exhibits seized were in fact drugs. Supt. Low said that the chemist did confirm they were drugs. However the chemist himself did not testify to that effect. But what is more crucial is how and in what manner the exhibits came back to Supt. Low's custody. There was no evidence adduced by the prosecution to show exactly what had happened to the exhibits between the time of handing over by Supt. Low to Supt. Lum and the subsequent examination by the chemist.

The following questions may be asked: what did Supt. Lum do with the exhibits after he received them from Supt. Low; where did he keep them; were they kept under lock and key; and did Supt. Lum return to Supt. Low the very same exhibits he received from Supt. Low. The answers to these questions are highly pertinent to a proper determination of the identity of the exhibits.

A very vital link in the prosecution case seems to be missing. The point was, in our view, rightly taken by Counsel for both the appellants when they contended that there was a serious break in the chain of evidence affecting proof as to the identity of the exhibits. It is a question of proof whether in fact the exhibits produced were the exhibits that were seized, handed over to Supt. Lum and returned by him to Supt. Low and then kept by the latter under lock and key until they were produced in Court.

As it was clear that Supt. Lum was given custody of the exhibits soon after the arrest of the appellants,it is reasonable to assume that police statements would have been taken from him and that he would ordinarily have been called to give evidence. He was however not called. Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v. PP* [1985] CLJ (Rep) 19). In so far as the trial Court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there

are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi's* case, *supra*).

We would observe at this point that the law is clear in that "it is unnecessary to call evidence to ensure there is no break in the chain of evidence". (*see Ah Ping v. PP* [1980] 1 MLJ 75). But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.

Supt. Lum would clearly have been able to provide the missing link in the chain of evidence if he had been called to give evidence for the prosecution. For some unknown reasons he was not called. In our view, it was clear that in the particular circumstances of this case, the failure to call this witness had caused a serious break in the chain of evidence relating to the identity of the exhibits. The break was so serious that we do not think there is any statutory cure. We would add that any attempt in such a case to apply the provisions of s. 60(1) of the Courts of Judicature Act 1964 would amount to a relaxation of the law of criminal procedure to such an extent as to deprive an accused person of his right. In this regard, it behoves us to reiterate that "the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the Court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else and therefore the appeal must be allowed and the conviction quashed". (*Sia Soon Suan v. PP* [1966] 1 MLJ 116).

In the circumstances of this case, it is our considered view that the appeal of the two appellants should be allowed and their conviction set aside and be substituted by an acquittal and discharge.

Also found at [1987] 1 CLJ 471